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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-75

STATE OF GEORGIA, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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BRIEF AMICI CURIAE FOR NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL COUNCIL OF CHURCHES, DELTA MINISTRY, NATIONAL DEMOCRATIC PARTY OF ALABAMA, NATIONAL LEAGUE OF WOMEN VOTERS, NATIONAL URBAN LEAGUE, INC., SOUTHERN ELECTIONS FUND, VOTER EDUCATION PROJECT, INC., MISSISSIPPI STATE REPRESENTATIVE ROBERT G. CLARK, AND AARON HENRY, CHAIRMAN OF THE DEMOCRATIC PARTY OF MISSISSIPPI

INTEREST OF AMICI

This brief amici curiae is tendered on behalf of seven organizations and two individuals who are actively en-

gaged in protecting the voting rights of black persons.[1] The amici are as follows:

National Association for the Advancement of Colored People has a membership of 470,000 persons and, since its formation in 1909, has been engaged in protecting the civil rights of minorities, including the right to vote;

National Council of Churches of Christ, Delta Ministry, was established in 1964 to aid the poor and oppressed in Mississippi and since that time has worked to protect the franchise of black people in that State;

National Democratic Party of Alabama is a predominantly black political party in the State of Alabama which has in the past five years elected 67 of its candidates to public office;

National League of Women Voters is a nonpartisan voluntary association of 160,000 women which seeks to promote informed and active participation by all voters and is committed to the elimination of discrimination in voting;

National Urban League, Inc., is an interracial, nonpartisan organization working through social and political processes to better the living conditions of all minorities;

Southern Elections Fund is a nonpartisan organization which offers campaign funds and advice concerning the electoral process to candidates for legislative, county and municipal public offices in the South;

Voter Education Project, Inc., is a nonprofit, nonpartisan organization engaged, *inter alia*, in assisting the registration of minority group voters;

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[1] The United States has consented to the filing of this brief, and the State of Georgia has stated that it has no objection to the filing of this brief. These consents have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

Mississippi State Representative Robert G. Clark is the first and only black person in modern times to hold a seat in the Mississippi Legislature; and

Aaron Henry is Chairman of the Democratic Party of the State of Mississippi and has been directly engaged for years in efforts to eliminate discriminatory barriers to the registration and voting of black persons.

These amici have joined in this brief to urge affirmance of the decision below.

STATEMENT OF FACTS

The material facts are not in dispute. In 1971, following the decennial census of 1970, the Georgia Legislature determined to reapportion its State House of Representatives,[2] which had last been apportioned, under court decree,[3] in 1968.

The 1968 plan had provided for 118 House districts, of which 47 were multi-member districts electing from two to seven representatives per district.[4] The 1968 House districts had followed county lines, though certain districts encompassed more than one county and certain counties included more than one district (A. 37). Pursuant to statutes enacted prior to November 1, 1964, candidates in multi-member districts had to designate the seat for which they would run—the so-called "num-

[2] The State Senate and federal congressional districts were also reapportioned by the Legislature at the same time. These changes were ultimately approved by the United States Attorney General and are not at issue in this case. (A. 73).

[3] See *Toombs* v. *Fortson*, 277 F. Supp. 821 (N.D. Ga. 1967).

[4] The 1968 plan superseded a 1964 court-decreed plan which contained 159 districts of which 38 were multi-member districts. Thirty of the 1964 multi-member districts had two members and eight had three members.

bered post" requirement. 47 Ga. Code Ann. § 119. If no candidate received a majority of the votes cast for a position, a majority runoff was required. 1962 Ga. Laws 1217, 1218; 1964 Ga. Laws, Ex. Sess. 174-75.

On October 14, 1971, the Georgia Legislature enacted a new plan reapportioning the districts for the State House of Representatives. This plan decreased the number of districts from 118 to 105. Forty-nine districts were multi-member districts, electing from two to six representatives.[5] Under the October 1971 plan, districts no longer followed county lines as they had in the 1968 plan. Thirty-one of the 49 multi-member districts and 21 of the 56 single-member districts irregularly crossed county boundaries. The counties were unevenly divided, and small, odd-shaped portions of one county were included within districts comprised mainly of territory within an adjacent county. The boundaries of all but one of the 105 districts were changed from the 1968 plan and the number of representatives altered in many. (A. 38). Moreover, as a result of the October 1971 reapportionment, the residents of 31 counties became subject to the numbered post requirement because within these counties there were changes from single-member to multi-member districts.[6]

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[5] Twenty-nine districts elected two representatives, 16 elected three representatives, three elected four representatives, and one elected six representatives. Of the 56 single-member districts, 31 were overlaid with floating representatives, so that the districts were actually represented by one and a fraction representatives. (A. 38).

[6] It appears from the record that all the residents in 30 of the counties were so affected while in one county only some of the residents were transferred from a single-member to multi-member district. (A. 38). The counties affected were: Appling, Bacon, Barrow, Barton, Brantley, Candler, Charlton, Coffee, Decatur, Emanuel, Evans, Fannin, Floyd, Gilmer, Grady, Houston, Jeff Davis, Jefferson, Lee, Lincoln, Lumpkin, Madison, Oconee, Ogl-

Following its enactment, the revised Georgia House redistricting plan was forwarded for review to the United States Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The Attorney General received the plan on November 5, 1971. On November 19, 1971, David L. Norman, Assistant Attorney General, requested that Georgia furnish the Attorney General with certain additional information relating to the proposed reapportionment necessary to complete the submission of the plan to the Attorney General and "to evaluate properly the changes . . . submitted." (A. 39).[7] The letter noted, in accordance with regulations promulgated by the Attorney General, 28 C.F.R. § 51.18(a), that the 60-day period within which the Attorney General was required to make his objection to the state plan would commence when the additional information was received (A. 41).[8] This additional information was received by the Attorney General on January 6, 1972. (A. 9).

On March 3, 1972, the Attorney General objected to the October 14, 1971, plan for the Georgia House of Representatives. In a letter on behalf of the Attorney General, Mr. Norman said (A. 10):

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thorpe, Pierce, Taliaferro, Towns, Union, Wayne, White and Wilkes. (A. 38).

[7] Specifically requested were census maps showing the 1964 and 1968 House districts, the distribution of white and non-white population within the 1964, 1968 and 1971 districts, a history of the primary and general elections in which black candidates ran, data on all elected state representatives, and the legislative history of all redistricting bills. (A. 39-41).

[8] 28 C.F.R. § 51.18(a): "If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission."

> "With respect to the reapportionment plan for the House of Representatives, a careful analysis and review of the demographic facts and recent court decisions identify several significant issues. Forty-nine of the 105 districts in the plan are multi-member and we note that it contains a requirement that candidates in those districts must run for numbered posts. We also note that existing Georgia law requires a run off in the event no candidate receives a majority of votes in either a primary or a general election. We note further that of the 105 districts 52 are made up of portions of a county, including 31 of the multi-member districts. These facts suggest that the state's traditional policy of maintaining county lines in designing legislative districts has been significantly modified.

The letter further stated that because of the plan's "combination of multi-member districts, numbered posts, and a majority (runoff) requirement" together with "extensive splitting and regrouping of counties" (*id.*), the Attorney General was "unable to conclude that the plan does not have a discriminatory racial effect on voting" (A. 10-11). That determination was reinforced by "demographic facts" relating to east central Georgia where seven formerly single-member districts with potential black majorities under the 1968 plan had been so combined under the October 1971 plan as to allow for only four majority black districts (A. 12). The letter continued that these "facts, in the context of a plan that frequently cuts across county lines, do not permit us to conclude, as we must under the Voting Rights Act, that this plan does not have a discriminatory racial effect on voting" (A. 12). Accordingly, the letter concluded, "I must on behalf of the Attorney General interpose an objection to changes submitted by the reapportionment plans . . . ." (A. 12).

Six days later, on March 9, 1972, the Georgia General Assembly, in response to the objection of the Attorney General, enacted a new reapportionment plan for the Georgia House (A. 33). The March 1972 plan provided for 128 districts of which 32 were multi-member districts. Twenty-two of the multi-member districts and 37 of the single-member districts still crossed county boundaries. The March 1972 plan differed from the October 1971 plan in that 14 of the "October" districts had been altered in the March 1972 plan by division into two or more districts or by other variation of the prior boundary lines. In the main these redistricting changes pertained to the east central Georgia counties that had black majority populations. Left unchanged were 13 multi-member districts in which the non-white population was so demographically concentrated that, in the Attorney General's opinion, the combination of multi-member districts, numbered posts, and majority runoff requirements, offered a significant likelihood of diluting or abridging the voting rights of these non-white persons. (A. 68).*

On March 24, 1972, the Attorney General objected to the March 9, 1972, plan for the Georgia House of Representatives which had been submitted to him on March 15, 1972. (A. 6, 13). In pertinent part, the Attorney General said (A. 13):

> "After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972 letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for

* There were 15 districts so demographically concentrated in the March 1972 plan. Thirteen of the 15 had the same boundaries as they did in the October 1971 plan. (A. 45, 68).

the reasons enunciated in my March 3, 1972 letter I must, on behalf of the Attorney General, object to S.B. 690 reapportioning the Georgia House of Representatives."

The Georgia Legislature had indicated by a resolution adopted when it passed the March 9, 1972, plan that it would take no further steps to enact another plan if the Attorney General continued to maintain his objections.[10] Thus, after his objection to the March 1972 plan, the Attorney General, on March 27, 1972, filed suit in the District Court for the Northern District of Georgia to enjoin the conducting of elections under either the October 14, 1971, or the March 9, 1972, plan inasmuch as these plans encompassed "standard[s], practice[s], [and] procedure[s]," different from those in effect on November 1, 1964, and which had not been approved either by the Attorney General or the District Court for the District of Columbia. See 42 U.S.C. § 1973c. A three-judge court was convened, and, after receiving oral and written submissions,[11] the court "enjoin[ed] the State of Georgia from proceeding to hold elections under the present reapportionment plan" (A. 75) because the plan had not been approved as required by Section 5 of the Voting Rights Act of 1965. Specifically, the court held that Section 5 was applicable to the new Georgia House reapportionment plan (A. 73-74):

"In view of *Allen* v. *State Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969), and *Perkins* v. *Matthews*, 400 U.S. 379, 27 L.Ed.2d 476,

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[10] In pertinent part the resolution provided "that in order to invoke the remedial powers of the Federal Courts, this Body does at this time respectfully decline to abandon multi-member districts, numbered posts and election by majority votes" (A. 18).

[11] In an "Interim Report" filed with the district court on April 18, 1972, the Attorney General made specific objection to 15 multi-member districts and withdrew objection as to the remaining multi-member districts (A. 67-71).

91 S.Ct. 431 (1971), this Court holds that Section 5 is applicable to such plans. Moreover, this reapportionment plan is subject to Section 5 because the plan constitutes a change from prior Georgia procedures in that it redraws district lines and in some instances, replaces single-member districts with multi-member districts. The State's contention to the contrary is not well-founded.

The court further held "that Section 5 of the Voting Rights Act is constitutional as applied." (A. 75). Finally, in response to Georgia's contention that the Attorney General's objection to the plan was not timely, the court said (A. 74):

> "In looking at the timetable of events in this case, we find that the Attorney General objected to the State's plan within the requisite 60 days. The first House reapportionment plan was submitted to the Attorney General on November 5, 1971. By letter dated November 19, 1971, the Attorney General requested further information from the State to aid in his Section 5 review. At that time, the Attorney General advised the State that the 60-day period for objection would commence running when the additional information was received by the Justice Department. That additional information was received on January 6, 1972 (more than 60 days after the State first submitted its plan), and the United States made its objection to the plan on March 3, 1972. Since the Attorney General's objection of March 3, 1972, was made within 60 days of his receipt of the additional information, we find that there was compliance with the 60-day time limit by the Attorney General. Likewise, the Attorney General's March 24, 1972 objection to the second House reapportionment plan dated March 9, 1972 was within the 60-day period. The Court will not allow the State to withhold additional information sought by the Attorney General until after the 60-day period has

elapsed and thereafter contend that the Attorney General failed to object within the statutory period."

Prior to the issuance of its written opinion, the district court had announced orally its decision to enjoin the enforcement of the Georgia House districting plan (A. 58) and had considered the question of an appropriate remedy at the same oral hearing. The Court had indicated that "it would be wise [for Georgia] to work with the Justice Department" on this matter (A. 63). The Speaker of the Georgia Assembly agreed to hold a special session to enact a new House apportionment plan devised in conjunction with "representatives from the Justice Department [who would] come down and work with us on this." (A. 65). Elections were to be held under the proposed new plan.

On April 21, 1972, this Court stayed the enforcement of the district court's order. *Georgia* v. *United States*, No. A-1106 (Apr. 21, 1972). Consequently, both primary and general elections took place under the March 9, 1972, reapportionment plan.

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, suspends the operation of "any" change in a "standard, practice or procedure with respect to voting" in covered States and political subdivisions until the Attorney General of the United States acquiesces in the implementation of the change or the District Court for the District of Columbia declares that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." This provision is a linch-pin in the system designed by Congress to eliminate racial discrimination in voting. One hundred years of history had shown that no set proscription of discrimination by Congress or the courts would be effective against the

ingenuity of certain States which had consistently developed new means to deny or abridge the vote once old ones had been struck down. So Congress froze the voting laws and procedures in these States as they had been in November 1964 and required that any change be scrutinized for discriminatory purpose or effect before becoming operational. This Court has three times fully considered Section 5 in major cases, upholding its constitutionality, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and construing it to cover shifts from district to at-large elections, *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), and redrawing of boundaries, *Perkins* v. *Matthews*, 400 U.S. 379 (1971).

The major issues presented here are whether the preclearance requirements of Section 5 are applicable to reapportionment laws of state legislatures and are constitutional as so applied. Minor issues are whether, in determining to object to the proposed changes in the Georgia voting laws, the Attorney General properly placed the burden of proof on the submitting jurisdiction and whether he interposed his objection in timely fashion. We believe that the Attorney General properly applied Section 5 to reach reapportionment plans; that to do so was constitutional; that he correctly placed the burden of proof of non-discrimination on the applicant; that he acted timely in interposing his objection; and that the principles enunciated by this Court in *South Carolina* v. *Katzenbach*, *Allen* and *Perkins* establish the correctness of his actions.

1. *Allen* v. *State Board of Elections*, 393 U.S. 544, 565-66, 569 (1969), holds that changes in election laws which have the potential for diluting the voting strength of black voters must be cleared pursuant to Section 5. Reapportionment is such a change. History, decided court cases and rulings of the Attorney General pursuant to Section 5 demonstrate beyond question that such laws

have a significant potential for diluting the voting strength of black voters. Moreover, the inclusion of reapportionment laws within the compass of Section 5 was intended by the Congress. In 1970 Congress determined to extend the Voting Rights Act of 1965 for five additional years. Congress made that determination with knowledge that covered States would be reapportioning in the wake of the 1970 decennial census, that this Court had recognized that the Act was to be given "the broadest possible scope" (*id.* at 567), and that Section 5 had been applied to redistricting actions. Congress made no exception for reapportionment laws.

2. Section 5, as applied to the reapportionment laws of covered States, is "appropriate legislation" authorized by Section 2 of the Fifteenth Amendment. The enabling clause of the Amendment, as this Court held in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966), permits Congress to use "any rational means to effectuate the constitutional prohibition of racial discrimination in voting." Moreover, in *South Carolina* v. *Katzenbach*, this Court held that preclearance of changes in standards, practices or procedures respecting voting in covered States was a rational means for effectuating the Fifteenth Amendment. Reapportionment is merely a name for a collection of changes in voting laws, particularly changes in the boundaries of election districts and changes in the allocation of representatives among districts. Like any other change in voting laws, reapportionment may be used to dilute the voting power of minority groups. It was, therefore, rational and permissible for Congress to subject such plans to preclearance procedures in order to assure that the rights of minority group voters are not abridged.

3. The Attorney General objected to the Georgia reapportionment plan because Georgia failed to demonstrate that the plan did not have a discriminatory purpose or

effect. Appellants argue that the Attorney General improperly placed the burden of proof on Georgia. In the court below, however, the State conceded that "the Justice Department is not required to prove discrimination" (A. 54). That concession should remove the issue from consideration. In any event, the argument is without merit since the uncontradicted legislative history of the Act demonstrates that the intention of Congress was to "plac[e] the burden of proof on a covered jurisdiction." H.R. Rep. No. 91-397, 91st Cong., 1st Sess. 8 (1969).

4. The Attorney General's objection to the Georgia plan was timely. The plan enjoined by the court below was presented to the Attorney General on March 15, 1972. He announced his objection on March 24, 1972, which is well within the 60-day period for objection set forth in Section 5. Georgia argues that a prior objection of the Attorney General to an earlier and different reapportionment plan was untimely. We do not believe that the argument is properly in this case. Moreover, it is defective on the merits since the Attorney General ruled within 60 days of receiving a complete submission of the proposed change. From the outset Georgia was advised by the Attorney General and by Department of Justice regulations governing submissions pursuant to Section 5 that the 60-day period would commence effective upon receipt of the information deemed essential to evaluate whether the proposed change would have the purpose or effect of abridging the right to vote on account of race. Georgia chose to make its submission in piecemeal fashion, and the Attorney General objected within 60 days after receiving the complete submission. The Attorney General's regulations providing that a change is submitted only when the information necessary to evaluate it is received should be given authoritative effect by the Court, and, in any event, his reasonable and necessary construction of Section 5 should be adopted.

ARGUMENT

I

ALL CHANGES IN ELECTION LAWS HAVING THE POTENTIAL OF DILUTING THE VOTING STRENGTH OF BLACK VOTERS, INCLUDING CHANGES MADE INCIDENT TO REAPPORTIONMENT, ARE SUBJECT TO THE PRECLEARANCE PROCEDURES OF SECTION 5 OF THE VOTING RIGHTS ACT

A. Introduction.

The Georgia 1972 reapportionment act changed the boundaries of virtually every election district from what they had been in 1968. The law for the first time placed some voters in the State in "multi-member districts" and exposed them to the politics and mechanics of voting for numbered posts. In addition, other voters were shifted from multi-member to single-member districts.[12] The

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[12] These facts answer Georgia's assertion (Ga. Br. 25-30) that the 1972 reapportionment plan did not in actuality constitute a change in the State's voting laws. They also support the district court's finding that there was in fact a change (A. 73-74):

> "[T]his reapportionment plan is subject to Section 5 because the plan constitutes a change from prior Georgia procedures in that it redraws district lines and in some instances, replaces single-member districts with multi-member districts. The State's contention to the contrary is not well-founded."

Georgia may be suggesting that as a matter of law the 1972 plan was not, in the words of Section 5, a "standard, practice or procedure with respect to voting *different* from that [previously] in force or effect" because the State's prior plan had included boundary lines, single and multi-member districts, and requirements for numbered posts and majority runoffs—albeit in different configurations. The legislative history of Section 5 bars any claim that a covered jurisdiction may apply old practices in a new manner without preclearance. See, *e.g.*, the testimony of Attorney General Katzenbach in 1965 that a change from paper balloting to machine balloting would be covered by Section 5 and the testimony of Assistant Attorney General Norman in 1970 that a reduction in filing fees for candidates is covered by Section 5. Hearings

question before the Court is whether such reapportionment changes are covered by Section 5 of the Voting Rights Act of 1965.

By its terms Section 5 requires covered States such as Georgia to submit to the Attorney General or to the District Court for the District of Columbia "any . . . standard, practice or procedure with respect to voting" which is "different from that in force or effect" on November 1, 1964 or November 1, 1968. 42 U.S.C. § 1973c (1970 ed.). The language of Section 5 is categorical. It reaches "any" standard, practice or procedure respecting voting. Beyond that, voting is defined in Section 14(c) of the Act in broad terms. Voting encompasses "all action necessary to make a vote effective . . . including, but not limited to, registration, . . . listing . . . , casting a ballot and having such ballot counted properly and included in the appropriate totals of votes cast . . . ." 42 U.S.C. § 1973*l*.

Moreover, this Court has said that these words are to be given the broadest possible meaning. In *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969),[12] this Court scrutinized the text of Section 5, studied its legislative history and explained its scope. The Court observed that "the legislative history on the whole supports the view that Congress intended to reach *any* state enactment which altered the election law of a covered State in *even a minor way*." *Id.* at 566 (emphasis added). Thus, the

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on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, p. 62 (1965); Hearings on Amendments to the Voting Rights Act of 1965, before Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2 Sess., p. 511 (1970). See also *Perkins* v. *Matthews*, 400 U.S. 379 (1971) (a change in the boundary of an election district is within Section 5).

[12] *Allen* was decided together with No. 25, *Fairley et al.* v. *Patterson*, No. 26, *Bunton et al.* v. *Patterson*, and No. 86, *Whitely et al.* v. *Williams*.

Court noted that even though the initial draft of the Act covered voting "qualifications and procedures" and the Attorney General had testified that the word "procedures" "was intended to be all inclusive of any kind of practice," Congress cast the final Act in terms even more encompassing—namely, "qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." Congress, said the Court, held "an intention to give the Act the broadest possible scope." *Allen*, *supra*, at 566-67.[14] In addition, the Court reviewed the testimony before the Senate and House committees and the debates over the passage of the Act. This commentary indicated that there were "'precious few,'" perhaps "two or three types of changes in state election law (such as changing from paper ballots to voting machines) which could be specifically excluded from § 5 without undermining the purpose of the section." Nevertheless, as the Court found, "Congress chose not to exclude even these minor exceptions in § 5, thus indicating an intention that all changes no matter how small, be subjected to § 5 scrutiny." *Id.* at 567-68.

Allen's bearing on the case at bar, however, is not restricted to the Court's explanation of the general contours of Section 5. As we show below, *Allen* holds that Section 5 covers changes in standards, practices and procedures which have the potential for diluting the voting strength of black voters, as well as those which would deny the franchise absolutely to black voters. *Id.* at 565-66, 569. Reapportionment laws, we submit, fall naturally within the coverage of the Act, as determined by *Allen*, because such laws have the potential for diluting the voting strength of black voters. Moreover, Congress intended

[14] See *Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971), where the Court said, "We held in *Allen* that Congress intended that the Act be given 'the broadest possible scope' to reach 'any state enactment which altered the election law of a covered State in even a minor way.'"

such laws to be governed by Section 5. In 1970, Congress was advised that reapportionment laws enacted pursuant to the 1970 census would come within the coverage of Section 5 as construed by this Court in *Allen*. After a careful reexamination of the Act, Congress extended Section 5 for five years in substantially verbatim terms, thereby adopting this Court's construction of the Act.

B. Section 5 Covers Changes in Election Laws That May Dilute the Voting Strength of Black Voters.

1. Allen *Holds That Section 5 Covers Changes That May Dilute the Voting Strength of Black Voters.*

In amici's view, *Allen* reveals the doctrinal basis for concluding that reapportionment laws come within the coverage of Section 5. *Allen* makes clear that one of the evils or mischiefs which Congress sought to protect against was dilution of black voting strength in covered States. The *Allen* Court's holding on this point is found in the portion of the Court's opinion dealing with No. 25, *Fairley* v. *Patterson*.

At issue in *Fairley* was a 1966 amendment to the Mississippi law pertaining to the election of the board of county supervisors in each county in the State. Prior to the amendment, each county was divided into five "beats" —districts—and the electors in each district elected one of the five members of the county board of supervisors. By virtue of the 1966 amendment the county boards of supervisors were authorized to adopt orders providing that the board members would be elected at large by all qualified voters in the county rather than on a district-by-district basis. *Fairley, supra*, 393 U.S. at 550.[18]

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[18] The ostensible purpose for enacting these amendments was to meet the one-man one-vote requirement of the Fourteenth Amendment. See the testimony of Mississippi Attorney General Summer, quoted at note 23, *infra*.

Fairley presented an instance where the new legislation did not enact any rule or standard that might be used to deny, in absolute terms, the right of a Negro to cast a ballot. Rather the new legislation, at worst, could only dilute the voting strength of black voters. Thus, the issue before the Court was whether the Voting Rights Act protected against the dilution of black voting strength as well as against the absolute denial of the right to vote.

Mr. Justice Harlan, in dissent, took a restrictive view of "voting" as that term is used in the statute. He believed that Section 5 applied only to a change in "either voter qualifications or the manner in which elections are conducted." *Id.* at 591. He rejected the idea that "a state covered by the Act must submit for federal approval all those laws that could arguably have an impact on Negro voting power, even though the manner in which the election is conducted remains unchanged." *Id.* at 588. In his view, "Congress did not in any way adopt the reapportionment cases' expansive concept of voting when it enacted the Voting Rights Act of 1965." *Id.* at 589.

The majority in *Fairley* held that the change from district to at-large elections came within the coverage of Section 5 because "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)." [16] The Court pointed out that in Mississippi black voters "might well be in the majority in one district, but in a decided minority in the county as a whole." The change in law "could therefore nullify their ability to elect the candidate of their choice just as

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[16] *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 569. Seven Justices joined in the opinion of the Court, and Mr. Justice Black, who dissented on grounds that Section 5 is unconstitutional, observed that "Assuming the validity of the Voting Rights Act of 1965, as the Court does, I would agree with its careful interpretation of the Act, . . . and with its disposition of the four cases now before us." *Id.* at 595.

would prohibiting some of them from voting." *Allen* v. *State Board of Elections, supra*, 393 U.S. at 569.

In this connection, the Court noted that "The Voting Rights Act was aimed at the subtle, as well as the obvious state regulations which have the effect of denying citizens their right to vote because of their race." The Court focused specifically on the definition of "voting" in Section 14(c) of the Act: this definition "gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make the vote effective.'" *Id.* at 565-66, quoting 42 U.S.C. § 1973*l*(c). Furthermore, the Court said in *Allen*, the broad meaning of voting is "compatible with the decisions of this Court," particularly *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964), which protects against dilution.[17]

Thus, *Allen* makes clear that Section 5 of the Voting Rights Act protects against dilution as well as total denial of the franchise, and that "standards, practices and procedures" which may arguably be used to dilute the voting strength of Negro voters are "standards, practices and procedures with respect to voting" which must be submitted for preclearance according to the terms of Section 5 of the Act.[18]

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[17] At page 555 of the *Reynolds* decision, which the Court specifically refers to in *Allen*, the *Reynolds* Court concluded that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).

[18] See also *Perkins* v. *Matthews*, 400 U.S. 379, 390, where the Court reviewed its opinion in *Allen* and observed:

> "In *Fairley* v. *Patterson*, 393 U.S. 544 (1969), a companion case to *Allen*, this Court held that § 5 applied to a change from district to at-large election of county supervisors on the ground that
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> '[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a

2. *Congress Extended Section 5 of the Voting Rights Act for Five Years with the Understanding That It Covered Changes in Election Laws That May Dilute the Voting Strength of Black Voters.*

As originally enacted, Section 5 was scheduled to expire on August 6, 1970. Congress, however, in the Voting Rights Amendments of 1970, extended the provisions of Section 5 for five more years without making any substantive modification of that section.[19] The deliberations of the Congress, moreover, demonstrate that the decision to extend Section 5 was fully considered and not merely a *pro forma* matter.[20]

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ballot. See *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964).' 393 U.S., at 569

Mr. Justice Harlan's separate opinion in that case accurately recognized that the Court's holding rested on its conclusion that 'Congress intended to adopt the concept of voting articulated in *Reynolds* v. *Sims*, 377 U.S. 533, (1964), and protect Negroes against a dilution of their voting power.' *Fairley* v. *Patterson*, *supra*, at 588."

[19] See P.L. 91-285, 84 Stat. 314, 315 (1970).

[20] House and Senate subcommittees held hearings on various bills which would extend the Voting Rights Act, as well as a proposal by the President which would have permitted the preclearance procedures of Section 5 to expire. H.R. 12695, 91st Cong., 2d Sess. (1970); S. 2507, 91st Cong., 2d Sess. (1970). See Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 91st Cong., 1st and 2d Sess. (1970); Hearings on H.R. 4249, H.R. 5538, and Similar Proposals, before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., ser. no. 3 (1969). House Subcommittee No. 5 of the Judiciary Committee reported favorably to the House on H.R. 4249, which would extend the Voting Rights Act, including Section 5, for five additional years. House Rep. No. 91-397 To Accompany H.R. 4249, 91st Cong., 1st Sess. (July 23, 1969). The Senate Committee on the Judiciary reported H.R. 4249 "without recommendation," and ten members of the Senate Judiciary Committee prepared a statement of their joint views. 116 Cong. Rec. S 2754 (daily ed. March 2, 1970). The House debated for two days and ultimately adopted the bill pro-

Throughout the extensive hearings and debates on the question of extending the bill, this Court's decision in *Allen* was referred to again and again by opponents and proponents of the Voting Rights Amendments of 1970.[21] The decision was published in the House Hearings.[22] The Report of the House Judiciary Subcommittee No. 5 states that "[I]n *Allen* v. *Board of Elections*, 393 U.S. 544 (1969), the Court determined the scope and application of provisions requiring Federal review of new State voting enactments (sec. 5):". H. R. Rep. 397, 91st Cong., 2d Sess. 4 (1970).

The legislators were continually made aware that Section 5 covered changes in standards that could dilute or abridge the power of Negro voters as well as changes in standards that would totally deny the franchise.[23] Thus,

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posed by the Administration. 115 Cong. Rec. H 12184 (daily ed., December 11, 1969). The Senate intermittently debated the question of extending the Voting Rights Act on March 2-5 and 9-13, 1970, and voted to extend the Act on the latter date. 116 Cong. Rec. S 3174 (daily ed. March 13, 1970). Finally, the House, after further debate, acceded to the Senate's bill. 116 Cong. Rec. H 5679 (June 17, 1970).

[21] See, *e.g.*, Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 91st Cong. 1st and 2d Sess. at 48, 52, 168-69, 196, 369-70, 393, 426-27, 469, 505, 522 (1970); Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., ser. 8 (1969) at 1, 4, 18, 33, 130-31, 147, 148, 149, 155, 172, 182-83, 267, 271, 313. See particularly the Senate debates, 116 Cong. Rec. at S 2775, 2788 (daily ed. March 2, 1970), S 3185, 3192-94 (daily ed. March 6, 1970), S 3901 (daily ed. March 12, 1970).

[22] Hearings on Voting Rights Act Extension before Subcommittee No. 5, House Judiciary Committee, 91st Cong., 1st Sess. 402 (1969).

[23] Attorney General Summer of Mississippi appeared before Subcommittee No. 5 of the House Committee on the Judiciary to oppose an extension of Section 5. He relied heavily upon Mr. Justice Harlan's dissent in *Allen*, and explained that the Court in *Allen* "held that 'voting' as used in Section 5 meant 'all actions necessary to make a vote effective' and that any dilution of voting power was prohibited as fully as a complete denial of the right

in discussing the need for extending the Voting Rights Act of 1965, the House Report points out that while the Act had increased Negro voter registration "several jurisdictions have undertaken new, unlawful ways to diminish the Negroes' franchise and to defeat the Negro and Negro-supported candidates." *Id.* at 7. The House Report also observes that "The U. S. Commission on Civil Rights has reported that these measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts and facilitating the consolidation of predominantly Negro and predominantly white counties." So too, "Several Federal court decisions offer further documentation of the efforts made to dilute the recent gains in Negro voting strength." *Id.*, citing, *inter alia*, *Smith* v. *Paris*, 257 F. Supp. 901 (M.D. Ala. 1966).[24] Finally, the re-

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to vote at all." Hearings on Voting Rights Act Extension, before Subcommittee No. 5, House Judiciary Committee, 91st Cong., 1st Sess., ser. 3 (1969), at 130. He also pointed out that the Mississippi law which was stayed in *Fairley* "provided counties with the option of redistricting or going to a county-at-large basis for electing supervisors. This last act was passed by our legislature to comply with the one-man, one-vote rule of *Baker* v. *Carr*, 369 U.S. 186 and *Reynolds* v. *Sims*, 377 U.S. 533." *Id.* Attorney General Summer gave the same testimony in Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 91st Cong., 1st and 2d Sess. 369-70 (1970).

[24] "The Joint Views of Ten Members of the [Senate] Judiciary Committee" quoted the following testimony of Mr. Howard A. Glickstein, Staff Director of the United States Commission on Civil Rights:

> "In 109 wards [in Louisiana], Negroes were in the majority, according to the 1960 Census, while Negroes only constituted the majority of voters in five parishes. Thus, a change from ward to at large voting [as proposed in 1968 with respect to police juries] would have the effect of diluting the actual or potential voting power of Negro inhabitants. The Attorney General, in objecting to the change in September 1969, re-

port again takes "note" of the *Allen* decision in which "[t]he Court discussed the history of enforcement of Section 5 and clarified its scope." *Id.* at 8.

The short of the matter is that Congress reenacted Section 5 with the full knowledge and understanding that the Act covered not only those standards, practices and procedures that could deny absolutely the right to vote, but also, as this Court held in *Allen*, those that could be used to dilute or abridge the voting strength of Negro voters. *Allen*, therefore, stands not only as this Court's definitive statement of the mischiefs that Section 5 of the Voting Rights Act of 1965 guarded against, but also as the interpretation that Congress adopted when it passed the Voting Rights Amendments of 1970. *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.' "). *Accord*, *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924); *cf. Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237 (1873) ("when a judicial construction has been given to a statute, the reenactment of

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ferred to the decision of the Supreme Court in *Allen*, in which the Court stated:

> 'The right to vote can be affected by dilution of voting power as well as by an absolute prohibition on casting a ballot.' [citing "Letter of September 10, 1969 from Jerris Leonard, Assistant Attorney General, Civil Rights, to Jack P. Gremillion, Attorney General of Louisiana, quoting the Supreme Court at 393 U.S. 569."]' "

116 Cong. Rec. S 2758, 2760 (daily ed. March 2, 1970). See also Appendix B to the "Joint Views" where the Civil Rights Commission Staff advised that "until the *Allen* decision . . . it had been unclear whether Section 5 applied to all election law changes in covered states, or only to those changes which dealt with voting and registration . . . . Because the Court has now made clear that Section 5 has a very wide scope, States can now be expected to submit more statutes for approval." *Id.* at S 2764. See also *Id.* at S 3193, 3194 (daily ed. March 6, 1970).

the statute is generally held to be in effect a legislative adoption of that construction"); *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-5 (1954).

C. Revisions of Voting Districts and Switches to At-Large Elections Can Dilute the Voting Power of Negroes.

We demonstrated above that the Voting Rights Act covers any change in election laws that may have the effect of diluting the voting strength of black voters. We turn now to the question whether redistricting and switching from single- to multi-member districts—actions embodied in the 1972 Georgia reapportionment plan—have a potential for diluting the voting strength of black voters. If so, the court below properly held that the plan fell within the preclearance provisions of Section 5.[22]

The Georgia legislation at bar draws new voting districts for the election of representatives to the Georgia House of Representatives. In some of the newly drawn districts only a single representative is elected to the House. In other districts ("multi-member districts") from two to six legislators are elected at-large from the district. A candidate for office in the multi-member districts may seek only one of the several available seats in the district and must designate in advance, by number, the particular seat for which the candidate is vying. The legislation at bar thus redefines the geographical limits

[22] The issue for determination here is not whether Georgia's election laws in fact violate the Fifteenth Amendment. That question, the merits, was reserved by Section 5 for determination by the District Court for the District of Columbia or the Attorney General and is not properly before the Court. *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971). Rather the sole question to be addressed is whether standards, practices and procedures of the nature embodied in the Georgia plan can be drawn in a manner that would dilute the voting strength of black voters.

of the voting district where the voter will cast his ballot. It changes the racial and political composition of the other voters in a given voter's district. And if the voter is in a newly created multi-member district, it exposes him to "at-large" elections and the mechanics and politics of voting for numbered posts.

There can be no question that the process of drawing new lines and creating multi-member districts with at-large election procedures can be used to dilute the voting strength of black voters.[26] Redistricting requires that voters be divided into groups. If in redistricting the distribution of voters by race is known and considered, the voting strength of minority groups within the population can be significantly diluted. *Whitcomb* v. *Chavis*, 403 U.S. 124, 176-77 (1971) (Douglas, J., dissenting) ("Lines may be drawn so as to make the voice of one racial group weak or strong as the case may be."). For example, in the course of redistricting white voters can be added to formerly black majority districts to decrease the black voting strength within the newly formed district. Alternatively, a former black majority district can be divided among many surrounding districts to eliminate the black voting strength within the old district. Moreover, when a state legislature is authorized to form multi-member districts, redistricting becomes an even more formidable device for diluting black voting strength for entire single-member districts may be lumped together to create a majority white multi-member district.[27]

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[26] For years legislators wilfully used such devices to dilute the strength of voters considered favorable to an opposing party. *Sims* v. *Baggett*, 247 F. Supp. 96, 104 (M.D. Ala. 1965) ("The practice of gerrymandering for the purpose of preventing members of a political party from being elected is a familiar one."); see also *Whitcomb* v. *Chavis*, 403 U.S. 124, 176, 180 (1971) (Douglas, J., dissenting); *Wells* v. *Rockefeller*, 394 U.S. 547, 555 (1969) (White, J., dissenting).

[27] See *Graves* v. *Barnes*, 405 U.S. 1201, 1202 (1972); *Whitcomb* v. *Chavis*, 403 U.S. 124, 143-144 (1971); *Burns* v. *Richardson*, 384

Even in the relatively few cases in which this Court has construed Section 5 of the Voting Rights Act of 1965, it has held that changing lines through annexation and substituting at-large elections for single-seat elections —practices which are indistinguishable in principle from those employed by the Georiga Legislature—have the potential for diluting the voting strength of minority groups. In *Fairley* v. *Patterson*, *supra*, the Court held that a change from single-member voting districts within a county to at-large elections within the county constitutes the type of change that could nullify the black voters' ability to elect the candidate of their choice. The Court recognized that "[v]oters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." 393 U.S. at 569.

In *Perkins* v. *Matthews*, 400 U.S. 379 (1971), the concern was whether the annexation of new territory by a city—redrawing of the boundary line—was a change requiring submission and approval before it could be implemented. The Court held "§ 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation." *Id.* at 388-389. In this connection, the Court observed:

> "Clearly, revision of boundary lines has an effect on voting in two ways: (1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election

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U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 487, 489 (1965); *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972); *Bussie* v. *Governor of Louisiana*, *supra*; see also *Perkins* v. *Matthews*, *supra*, (change from ward to at-large election of alderman); *Allen* v. *State Board of Elections*, *supra* (change from district to at-large election of county supervisors); *Smith* v. *Paris*, 257 F. Supp. 901 (M.D. Ala.), *aff'd*, 386 F.2d 979 (5th Cir. 1966) (change from "beat" to at-large election of committeemen).

and who may not; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.' *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), provides a clearcut illustration of the potential of boundary changes for 'denying or abridging the right to vote on account of race or color.' In addition, based on the findings of an 18-month study of the operation of the Voting Rights Act by the United States Civil Rights Commission, the Commission's director reported to Congress that gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters:

> 'The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Acts and the increased black registration that followed has resulted in new methods to maintain white control of the political process.
>
> "For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly franchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.' Hearings on Voting Rights Act Extension be-

fore Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 8, p. 17 (1969) (remarks of Mr. Glickstein)."

To summarize, there can be no question that a legislature may draw lines and establish new multi-member districts in such a way as to dilute the voting strength of black voters." Such legislation, therefore, comes within the coverage of Section 5 of the Voting Rights Act of 1965, as amended.

D. Section 5, as Amended, Does not Exempt Changes in Elections Laws That are Made Incident to Reapportionment.

1. Georgia Has Not Demonstrated a Basis for Exempting Reapportionment Laws from Section 5.

In the case at bar, the election law was enacted for the avowed purpose of reapportioning the Georgia Legislature. Georgia argues that such laws are not subject to the preclearance procedures of Section 5 because "Reapportionment simply is not a 'voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting' within the meaning of Section 5" (Ga. Br. 22).

" Reapportionment plans not only can be used to dilute black voting strength, but in fact have been so used. In Appendix A amici have reprinted four letters of the Attorney General in which he has objected to reapportionment plans submitted under Section 5. See also *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Tex.), *stay denied*, 405 U.S. 1201 (1972) (Powell, J.) (multi-member districts); *Sims* v. *Amos*, *supra* (multi-member districts); *Dunston* v. *Scott*, 336 F. Supp. 206 (E.D. N.C. 1972) (multi-member districts used in conjunction with a numbered seat law and a law prohibiting voters from concentrating their votes on a single candidate ("anti-single shot" law)); *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971) (redistricting to dilute black vote); *Smith* v. *Paris*, 257 F. Supp. 901 (M.D. Ala.), *aff'd*, 386 F.2d 979 (5th Cir. 1966) (change from "beat" to at-large election of committeemen).

As we understand Georgia's position, the State does not ask that *Allen* and *Perkins* be reconsidered and overruled. Rather, Georgia's position is that *Allen* and *Perkins* did not hold that "reapportionment" laws were subject to Section 5, and thus it remains open for the Court to hold that the changes made by the Georgia Legislature —while identical in nature and potential discriminatory effect to the changes in *Allen* and *Perkins*—are exempt from Section 5 because Georgia's changes were made in the name of reapportionment.

Georgia's proposed exemption would eviscerate Section 5 of the Voting Rights Act. *Allen* and *Perkins* hold that drawing new lines and changing to elections at large require preclearance under Section 5 because such changes may dilute the voting strength of Negro voters. But under Georgia's argument these changes would not be subject to preclearance procedures if they were embodied in legislation that ostensibly is enacted for reapportionment.* Such an exemption for reapportionment would provide an escape hatch for every State that is now covered by the Act. It would be readily available to every covered State, moreover, because the 1970 decennial census made reapportionment appropriate at the same time as the Voting Rights Amendments of 1970 took effect.

Inasmuch as an exemption for reapportionment legislation would leave such a hole in the reach of the Act,

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*A similar argument was expressly rejected by this Court in *Allen*. There, Virginia argued that one of its voting regulations was exempt from Section 5 because the regulation was issued in order to comply with the Voting Rights Act. The Court, however, held that "A state is not exempted from the coverage of § 5 merely because its legislation is passed in an attempt to comply with the provisions of the Act. To hold otherwise would mean that legislation, allegedly passed to meet the requirements of the Act, would be exempted from coverage—even though it would have the effect of racial discrimination. It is precisely this situation Congress sought to avoid in passing § 5." *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 565, n. 29.

one would ordinarily expect to find such an exemption, if any, in the text of the Act.[20] That is not the case here. Section 5, indeed, uses language that would foreclose any exemption in declaring that "any" change in standards, practices or procedures with respect to voting is subject to the preclearance procedures of Section 5.

Alternatively, one would expect to find the basis for such an exemption in crisp statements by the draftsmen of the Act, the principal proponents and opponents of the Act, and in the reports of the congressional committees. Georgia, however, does not and cannot point to even one such statement. Instead, it seeks to fashion an exemption from the "silence" of congressmen in 1965,[21] while ignoring the legislative history of the Voting Rights Amendments of 1970. But, as noted above, *supra*, pp. 23-24, it is the scope of the latter Act which governs this case.

Even apart from the legislative history of the 1970 amendments, Georgia's argument is without merit. Section 5 of the original Act was enacted to protect Negro voting rights under the Fifteenth Amendment. The lan-

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[20] The approach of this Court to civil rights statutes of the Reconstruction Period has been to "accord [them] a sweep as broad as [their] language." *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971), quoting, *United States* v. *Price*, 383 U.S. 787, 801 (1966), and citing, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

[21] The enacting Congress did not endeavor to canvass the types of changes in election laws that might be included or excluded from the Act. It respected "the ingenuity of those bent on preventing Negroes from voting." *Allen*, *supra*, 393 U.S. at 548. Accordingly, the Act "was aimed at the subtle, as well as the obvious, state regulations, which have the effect of denying citizens their right to vote because of their race." *Id.* at 565. Attorney General Katzenbach pointed out that "Even in a sense a most innocent kind of law, as our experiences have indicated time and time again, can be used" to deny or abridge the rights of black voters. Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, p. 62 (1965).

guage of the original Act and the legislative history reveal that Congress intended that Section 5 be given the "broadest possible scope." *Allen, supra*, 393 U.S. at 567. Against this background there is no basis for permitting a covered State to implement potentially discriminatory voting laws in the name of reapportionment when such laws, but for the "reapportionment" label, would be subject to the preclearance procedures of the Act.

2. *The Legislative History of the Voting Rights Amendments of 1970 Demonstrates That Congress Did Not Intend To Exempt Reapportionment from the Requirements of Section 5.*

The legislative history of the Voting Rights Amendments of 1970 makes clear that Congress did not intend to exempt reapportionment laws from the preclearance procedures of Section 5. Proponents and opponents of Section 5 pointed out that redistricting or reapportionment laws enacted in light of the 1970 census would be subject to the preclearance procedures of Section 5 if that section were extended for five years, as proposed. Assistant Attorney General David Norman testified

> ". . . I agree that, from court decisions, all these redistricting plans are going to have to be submitted to the Attorney General for his approval because they are voting changes." Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess. 507 (1970).[21]

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[21] Following the passage of the Voting Rights Amendments of 1970, the Attorney General promulgated interpretive regulations requiring covered States to submit "any change in the constituency of an official or the boundaries of a voting unit (*e.g.*, through redistricting, annexation, or reapportionment). . . ." 28 C.F.R. 51.4(c)(3). These regulations were promulgated after the Department of Justice had for six years served as the principal administrator of the Act and had twice participated in the legis-

Lester Maddox, then Governor of Georgia, assumed that redistricting plans following the 1970 census would have to be submitted:

> "[An] [e]ven more unreasonable aspect of this act comes to light . . . when we consider that after the 1970 Census Georgia will be required to redraw legislative and congressional districts under the law. The Attorney General of the United States could disapprove the apportionment plan even though the Federal courts had approved them." *Id.* at 345.

Attorney General Summer of Mississippi testified that the Mississippi law suspended in *Allen* "was passed by our legislature to comply with the 'one-man, one- vote' rule of *Baker* v. *Carr*, 369 U.S. 186 and *Reynolds* v. *Sims*, 377 U.S. 533." *Id.* at 370. See also Hearings on Voting Rights Act Extension before Subcommittee No. 5 of House Judiciary Committee, 91st Cong., 1st Sess., ser. 8, at 131 (1969).

The statements of Congressmen and Senators reflect the same understanding. Rep. Flowers of Alabama dissented from the House Judiciary Committee Report which recommended extending the Act:

> "The Voting Rights Act of 1965 requires that States covered by said act must submit *every* proposed change in their election process to the Attorney General or the Federal district court in Washington for prior approval. This is a particularly onerous burden because the 1970 census (and recent Supreme Court rulings) will probably require the passage of reapportionment and redistricting acts in all seven

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lative process leading to the enactment and extension of Section 5 of the Voting Rights Act. The Attorney General's interpretation of Section 5, therefore, gives "further support" to the conclusion that the Act covers reapportionment laws, and his interpretation is entitled to "great deference" because of his role in the drafting and administration of the Act. *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390.

States. It will be difficult—if not impossible—to effect the required changes in district lines if the legislators must attempt to perform their duties while shuffling teams of attorneys back and forth to the Nation's Capitol in order to make certain that it is permissible to use the left bank of a particular river instead of a certain section line in redefining the boundaries of one of their State's Senatorial districts." Report of the Committee on the Judiciary to accompany H.R. 4249, H. R. Rep. No. 91-397, 91st Cong., 1st Sess. 22 (emphasis in original).

He repeated his thoughts on the floor (115 Cong. Rec. H 12138 (daily ed. Dec. 11, 1969)), and Rep. Poff of Virginia, a ranking member of the House Judiciary Committee, agreed that

> "a State which is covered today cannot pass a redistricting statute following the 1970 census without the prior permission of the Attorney General of the United States or the District Court in the District of Columbia." (115 Cong. Rec. H 12139 (daily ed. Dec. 11, 1969)).

Representative Ryan, on the other hand, argued that there was a need to continue Section 5 in force in order to monitor changes in election laws that could dilute the voting strength of Negroes. In this connection he said:

> "Another manner used to dilute the black vote is the consolidation of counties which have black voting majorities with counties which have white voting majorities.
>
> * * * *
>
> "Reapportionment and redistricting measures have been another method for diluting the black vote in the South." (Remarks of Rep. Ryan, 115 Cong. Rec. H 12144 (daily ed. Dec. 11, 1969)).

On the Senate floor Senators Stennis and Allen pointed to the forthcoming census and the consequent need for re-

apportionment. Senator Stennis, with Senator Allen's concurrence, then forecast the result of an extension of Section 5:

> "First, the law would demand that they change these districts, then another law—if this would become the law—would require them to come to Washington." (Remarks of Sen. Stennis, 116 Cong. Rec. S3595 (daily ed. March 12, 1969)).

In short, that Section 5 covered reapportionment was brought to the attention of the Ninety-First Congress time and again. There was no dispute among witnesses or legislators over the fact that Section 5 requires covered States to submit reapportionment laws for preclearance. Nor was any proposal made to exempt reapportionment laws from the preclearance procedures of the Act. Consideration was given to the scope of the Act and its effect on the States and the voters therein, and against that background Congress made a considered judgment to extend Section 5 of the Voting Rights Act for five years. In taking this action without so much as a nod toward exemption of reapportionment laws, Congress foreclosed any argument that the statute, by implication, may exempt reapportionment laws from the preclearance procedures of Section 5. See cases cited at pp. 23-24, *supra*.

E. Conclusion.

Section 5 of the Voting Rights Act, as enacted and later reenacted, in terms and purpose is designed to protect against the implementation of state election laws that would dilute or abridge the voting strength of Negro voters. The reapportionment laws of covered States fall naturally within the coverage of Section 5 because reapportment lends itself readily to diluting the voting strength of Negroes. The inclusion of reapportionment laws within the coverage of Section 5, moreover, is not a legal accident. In 1969 and 1970 Congress reexamined the Voting Rights

Act, having the benefit of this Court's decision in *Allen* and almost five years of practical operation of the Act. Congress was fully advised by this Court in *Allen* that the scope of Section 5 was broad indeed and in the Voting Rights Amendments of 1970, Congress adopted the *Allen* Court's construction of Section 5 and "made it a part of the [1970] enactment." See *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948). *Accord*, *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924). *Cf. Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237; *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-45 (1954). Moreover, Congress was advised that reapportionment changes required by the 1970 decennial census would come within the requirements of Section 5. Congress nonetheless chose not to alter the Act but rather to extend it in its original terms. Thus, by all standards, reapportionment laws come within the requirements of Section 5 of the Voting Rights Act.

II

SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 WAS CONSTITUTIONALLY APPLIED TO ENJOIN THE HOLDING OF ELECTIONS FOR THE GEORGIA HOUSE OF REPRESENTATIVES UNDER THE 1972 REAPPORTIONMENT PLAN

After concluding that Georgia's redistricting plan would occasion a serious potential abridgment of minority voting rights and being advised by the Georgia Legislature that it would not comply with the requirements of Section 5 of the Voting Rights Act, the Attorney General requested the court below to enjoin the implementation of Georgia's new reapportionment plan (*supra*, pp. 6-8). The lower court entered such an injunction, holding, *inter alia*, that "Section 5 of the Voting Rights Act is constitutional as applied" to Georgia's redistricting legislation (A. 75). In this Court Georgia renews its contention that

Section 5, if applied to reapportionment legislation, does not qualify as "appropriate legislation" authorized by Section 2 of the Fifteenth Amendment (Ga. Br. 22-25). Georgia also argues (Ga. Br. 25), as it did below, that Section 5 violates the Guaranty Clause (Article IV, Section 4),[*] and the Full Faith and Credit Clause (Article IV, Section 1).[**] In this part of our brief, amici demonstrate that Section 5, as applied to the Georgia redistricting plan, is legislation fully authorized by the Fifteenth Amendment.

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[*] There is no merit to appellants' argument that the application of Section 5 to the reapportionment plan before the Court would violate the Guaranty Clause. This issue was resolved by this Court's decisions in *South Carolina* v. *Katzenbach*, *Allen* and *Perkins*. In *South Carolina* v. *Katzenbach*, Justice Black in dissent stated that he would hold Section 5 invalid because it denied the States a republican form of government. 383 U.S. at 358-62 (Black, J., concurring in part and dissenting in part). The eight-member majority in that case nonetheless upheld the constitutionality of the section. In *Allen* and *Perkins*, Justice Black again indicated that he felt Section 5 was defective under the Guaranty Clause, (see 393 U.S. at 595-97) (Black, J., dissenting); 400 U.S. at 401-07, 409 (Black, J., dissenting)), yet the Court held that the section was valid as applied to the practices and procedures at issue in those cases, and some of those practices and procedures were similar to features of Georgia's reapportionment plan. (See discussion at pp. 26-27, *supra*.)

[**] Also unmeritorious is appellants' contention that applying Section 5 to the Georgia reapportionment plan would deny Georgia's laws full faith and credit. That clause—"Full Faith and Credit shall be given *in each State* to the public Acts, Records, and judicial Proceedings of every other State" (emphasis added)—governs only the deference which one State must pay to the laws of another State and therefore has no application here. Amici know of no case which has considered this language applicable in determining the relationship between a State's laws and those of the federal government, and none has been cited by appellants. Moreover, the Supremacy Clause (Art. VI, Cl. 2) is witness to the fact that the United States is not bound by the Full Faith and Credit Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

A. Section 2 of the Fifteenth Amendment Authorizing Congress To Enact "Appropriate Legislation" Permits Congress To Employ Any "Rational Means" To Effectuate the Fifteenth Amendment's Prohibition Against Racial Discrimination in Voting.

The Fifteenth Amendment, of its own force, prohibits denial or abridgment of "[t]he right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude." U.S. Const., Amend. XV, § 1. The Amendment further provides that "Congress shall have power to enforce this article by appropriate legislation." *Id.* § 2. Thus, the clear terms of the Amendment grant to Congress the power to ensure by "appropriate legislation" that the right to vote is not denied or abridged "on account of race, color, or previous condition of servitude."

This Court, in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324-25 (1966), has already held that Congress, in enacting Section 5, had passed legislation "appropriate" under the Fifteenth Amendment to ensure that the right to vote is not denied on account of race or color. In the course of its opinion, the Court discussed extensively the test to determine when legislation is "appropriate" under the Fifteenth Amendment and hence constitutional (*id.* at 326):

> "The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting . . . .
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> "The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in

all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

> 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' *McCulloch* v. *Maryland*, 4 Wheat, 316, 421."

As the Court indicated, the standard for judging the constitutionality of congressional legislation had been enunciated numerous times in an unbroken line of constitutional decisions. From Chief Justice Marshall's pronouncement in *McCulloch* v. *Maryland* to the words of the Court construing the enabling clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments in *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879),

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power"

to the Court's application of the same principle to the enabling clause of the Eighteenth Amendment, see *James Everard's Breweries* v. *Day*, 265 U.S. 545, 558-59 (1924), to the Court's decision sustaining the Civil Rights Act of 1957, 71 Stat. 637, as "appropriate" legislation under the Fifteenth Amendment in *United States* v. *Raines*, 362 U.S. 17 (1960), and *Hannah* v. *Larche*, 363 U.S. 420, 452 (1960), the Court adhered to the principle that the en-

abling clauses of the Federal Constitution authorize Congress to use "any rational means" to achieve the substantive goals set forth by the Constitution."

In light of these decisions, the validity of Georgia's attack on the constitutionality of Section 5 "as applied" to Georgia redistricting plans depends upon whether such application is a "rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 324. We demonstrate that such application was rational.

B. Section 5 As Applied Constitutes a Rational Means for Effectuating the Constitutional Prohibition of Racial Discrimination in Voting.

The means employed by Congress in Section 5 to effectuate the constitutional prohibition against racial discrimination in voting have already been expressly approved in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 334-35. There the Court held that because certain states, by enacting new voting laws, had sought to avoid court decrees enjoining the operation of old discriminatory laws, it was rational for Congress to require preclearance of "any" new "standard, practice or procedure with respect to voting."[11] In amici's view, *South Caro-*

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[11] The decisions of this Court subsequent to the ruling in *South Carolina* v. *Katzenbach* have continued to reflect this principle. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1964) (holding Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e), "appropriate" legislation under Section 5 of the Fourteenth Amendment), and *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (holding 42 U.S.C. § 1982 "appropriate" legislation under Section 2 of the Thirteenth Amendment). See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

[12] In *Allen* v. *State Board of Education*, *supra*, this Court, at least by implication, ruled that Section 5 could be constitutionally applied to suspend laws that establish at-large election procedures. Mr. Justice Harlan, concurring in part and dissenting in part, observed that the Court's application of the Act in *Fairley* v. *Patterson*, No.

lina v. *Katzenbach* is dispositive of the constitutional argument made by Georgia unless it can be said that it was "irrational" for Congress to conclude that reapportionment laws like Georgia's are among the type of voting laws that may be employed to deny or dilute the voting strength of Negroes.

We submit that far from being "irrational," this conclusion was in fact compelled. As we have indicated in some detail above (*supra*, pp. 25-28), reapportionment plans can, by their very nature, be used to dilute the voting power of blacks and other minority groups. In redistricting an area, whites can be added to what was formerly a majority black district, or blacks removed from it, so that black voting strength in the district is substantially diluted. If multi-member districts are authorized by state law, the potential for dilution is increased, for a single-member majority black district can be eliminated by combining it with one or more majority single-member white districts to form a multi-member majority white district.

This Court has recognized that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). It has also recognized that reapportionment plans and similar practices can be used to dilute the voting power of minority groups. Thus, in *Fairley* v. *Patterson, decided sub nom. Allen* v. *State Board of Election, supra*, this Court held that the switch from a district-by-district to an at-large election was covered by Section 5 because it allowed for significant

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25, raised for him substantial constitutional difficulties. 393 U.S. at 586, n. 4. The majority in *Allen*, however, stated that the constitutionality of Section 5 had been determined in *South Carolina* v. *Katzenbach* and that the cases before the Court in *Allen* "merely require us to determine whether the various state enactments are subject to the requirements of the Act," 393 U.S. at 548.

"dilution" of the right to vote of blacks. Similarly, in *Perkins* v. *Matthews*, 400 U.S. 379 (1970), this Court held that a municipality's switch from a ward to an at-large election of aldermen along with a municipal annexation of adjacent area was covered by Section 5 because "potential for racial discrimination in voting . . . inheres in a change in the composition of the electorate. . . ." *Id.* at 389. See also *Graves* v. *Barnes*, *supra*, 405 U.S. at 1202; *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143-44; *Burns* v. *Richardson*, *supra*, 384 U.S. at 88; *Fortson* v. *Dorsey*, 379 U.S. at 439; *Gomillion* v. *Lightfoot*, *supra*.

In sum, precedent and analysis combine to show that redistricting plans can significantly affect the right to vote of minority groups. Under the circumstances, the application of Section 5 of the Voting Rights Act of 1965 to Georgia's redistricting plans was constitutionally valid because preclearance of redistricting plans is a "rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 326.

III

THE ATTORNEY GENERAL PROPERLY OBJECTED TO THE GEORGIA REAPPORTIONMENT PLAN WHEN HE WAS "UNABLE TO CONCLUDE THAT THE PLAN DOES NOT HAVE A DISCRIMINATORY RACIAL EFFECT ON VOTING"

The Attorney General objected to the Georgia reapportionment plan because he was "unable to conclude that the plan does not have a discriminatory racial effect on voting" (A. 11, 13). When Georgia indicated it would hold elections under the disapproved plan despite the Attorney General's objection, the Attorney General successfully sought injunctive relief prohibiting such action. Georgia now argues that the Attorney General utilized

the wrong standard of proof in making his objection and that he should have objected only if he had affirmatively found "the change to be discriminatory" (Ga. Br. 34). Accordingly, Georgia argues, his objection was nugatory and the decision of the lower court should be reversed. Georgia's argument has no merit. The State, not the Attorney General, had the burden of proof. When it failed to convince the Attorney General that the new reapportionment law did not have a discriminatory purpose or effect, the Attorney General properly objected to the law."

This Court, however, need not consider whether the Attorney General utilized the appropriate burden of proof. Though the issue of the appropriate burden of proof was initially raised before the district court, that issue was specifically abandoned during the oral argument. There, Mr. Turner for the United States stated that he felt that the "language in the objection letter to the State, that we were unable to conclude that the plan was not discriminatory, was a sufficient basis for objection" (A. 53). "It is our position, Your Honor," said Mr. Turner, "that the United States does not have to prove discrimination" (A. 54). The State of Georgia agreed. By their attorney, Mr. Hill, the State said:

> "I do not want to give up any rights of our clients, but neither do I want to lead the Court into error. It is my understanding of the law that the Justice

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[37] Though Georgia has attempted to cast its argument in terms of whether the Attorney General was required to make a positive finding of discrimination before objecting to the State law (Ga. Br. 33-34), that argument when analyzed is no different than an argument that the Attorney General must bear the burden of proof. Thus, if a positive finding of discrimination were required, either the covered State or the Attorney General would have to produce the information upon which that finding could be based. Since no State is likely to produce information which would deny effect to its own law, as a practical matter the burden of proof would be on the Attorney General. But as we will show below, Congress intended that the burden of proof rest on the State.

Department is not required to prove discrimination" (A. 54).

This concession eliminated from the case the issue of burden of proof since, if the Attorney General need not prove discrimination, the burden must be with the State. Moreover, the State's concession below was sufficiently clear that the district court did not even refer to the issue of burden of proof in its opinion. That issue, accordingly, is not properly before this Court. Having deliberately abandoned their argument regarding burden of proof in the lower court, appellants should not be heard in their attempt to resurrect the issue here. See *Henry* v. *Mississippi*, 379 U.S. 443 (1965).

On the merits, appellants' argument deserves little more attention. The section of the Act which authorizes the Attorney General to object to a change in a State's voting laws is found as an alternate proviso within the same subsection of the Act that grants to the District Court for the District of Columbia power to approve or to object to such changes. From the face of the statute as well as from the context of its enactment, it is evident that when a State submits a plan to the district court the burden of showing nondiscrimination is placed upon the State. The statute requires the State to "institute an action . . . for a declaratory judgment that . . . [the new plan] does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. This is in contrast to earlier federal voting rights laws under which the United States and private plaintiffs had to institute suit and bear the burden of proof. See, *e.g.*, Section 131 of the Civil Rights Act of 1957, 42 U.S.C. § 1971(e); S. Rep. No. 162, pt. 3, 89th Cong., 2d Sess. 5-9 (1965), and cases there cited. The legislative history of Section 5 makes clear that Congress was concerned with the inability under the earlier

statutes of the Attorney General, as plaintiff and bearing the burden of proof, to combat successfully "the ingenuity and dedication of those determined to circumvent the guarantees of the 15th Amendment." H. R. Rep. No. 439, 89th Cong., 1st Sess. 10 (1965). Case-by-case litigation had proved unsatisfactory to secure the rights guaranteed by the Fifteenth Amendment. *Id.* at 9-11. Accord, S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess. 6 (1965) ("Experience has shown that the case-by-case litigation approach will not solve the voting discrimination problem."). "The burden is too heavy," said Congress. *Id.* at 11. In Section 5, the burden was reversed. The State must be plaintiff before the district court and bear the burden of proof.

The State bears the same burden in submissions to the Attorney General. The provision granting the Attorney General power to disapprove changes in state election laws was enacted only to provide a channel of decision alternate to that in the district court. See *Allen* v. *State Board of Elections*, 393 U.S. 544, 549 (1969). There is no indication in the statute or in the legislative history that the decision-making process was to be different when this alternate channel was utilized. Accordingly, the burden of proof should be similar. Indeed, to hold otherwise would be to allow the States to avoid the expressed intent of the framers of the Act, which was to place upon them the burden of showing that any new or revised law would be free from discrimination. The alternate proviso would have become an eviscerating loophole. It is reasonable to believe, therefore, that the same burden of proof rests upon a petitioning jurisdiction before the Attorney General as rests upon it before the district court.** The legislative history of Section 5 confirms this belief.

** Nor are the reasons for imposing the burden on the State difficult to understand. The relevant facts regarding the purpose and effect of each voting change are peculiarly within the knowledge of the entity making the change.

When the Voting Rights Act was reenacted in 1970, no State or political subdivision had submitted a change in voting laws to the District Court for the District of Columbia. All submissions had been to the Attorney General and hence the burden of proof utilized by him in determining whether to interpose an objection was of utmost significance. Congress was aware of the importance of the submissions made to the Attorney General. For example, the House Judiciary Committee stated in its report accompanying the bill:

> "The continuing importance of requiring the submission of new voting laws or regulations for Federal review is also attested by several recent actions taken by the Attorney General in disapproving changes in Mississippi and Louisiana statutes." H. R. Rep. No. 91-397, 91st Cong., 1st Sess. 7 (1969).

But though Congress knew that many important submissions had been made to the Attorney General, it gave no indication that it wished him, in the process of considering those submissions, to assume the burden of proving that State voting laws had a discriminatory purpose or effect. Rather, the House Judiciary Committee in its report recommending legislation to extend the 1965 Act said regarding the appropriate burden of proof:

> "The committee also takes note of the recent decision of the Supreme Court in *Allen* v. *Board of Elections*, in which the Court discussed the history of the enforcement of section 5 and clarified its scope. The decision underscores the advantage section 5 produces in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color.
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> * * * *

> "Failure to continue this provision of the act would jettison a vital element of the enforcement machinery. It would reverse the burden of proof and restore time-consuming litigation as the principal means of assuring the equal right to vote." H. R. Rep. No. 91-397, 91st Cong., 1st Sess. 8 (1969).

Similarly, in the Senate, the "Joint Views" of the majority of the Judiciary Committee recommending extension of the 1965 Act including the provisions of Section 5 at issue here, declared:

> "This section, in effect, freezes election procedures in the covered areas unless the changes can be shown to be nondiscriminatory. . . . [T]he advantage Section 5 produces in placing the burden of proof on a covered jurisdiction [is underscored by *Allen* v. *Board of Elections*]." "Joint Views of Ten Members of the [Senate] Judiciary Committee," 116 Cong. Rec. S 2756 (daily ed. March 2, 1970).*

The testimony at the hearings prior to reenactment of the Act was similar. For example, Senator Bayh, a member of the Senate Judiciary Committee, said, "I personally believe that this business of having the State bear the burden of proof in those areas where you have had a long chain of circumstancial evidence of discrimination is good." Hearings on Amendments to the Voting Rights Act of 1965, Sen. Jud. Comm., 91st Cong., 1st and 2d Sess., at 196. Similarly, Senator Mathias, also a member of the Senate Judiciary Committee, opposed an Administration-sponsored bill to alter Section 5 of the Act on

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* Congressman Poff of Virginia, an opponent of the extension, placed a similar construction on Section 5:

> "A federal law which raises a presumption of illegality against a law newly enacted by a State legislature and suspends its operation until the State comes to the Attorney General or a Federal court and proves its legality offends State sovereignty." H. R. Rep. No. 91-397, 91st Cong., 1st Sess. 14 (1969) (Separate Views of Rep. Poff).

the ground that the "important thrust of the proposed change, is that it casts the burden of proof on the other side." *Id.* at 22.

In sum, in reenacting Section 5 in 1970, Congress believed that the State had the burden of proof in proceedings before the Attorney General and intended to keep the burden there. The Attorney General properly objected to the Georgia reapportionment statute when he was "unable to conclude that the plan does not have a discriminatory racial effect on voting." (A. 11).

IV

THE ATTORNEY GENERAL'S OBJECTION TO THE REAPPORTIONMENT PLAN WAS TIMELY

A. Introduction.

Section 5 provides that any change which has been submitted to the Attorney General for approval may be enforced by the State submitting it if "the Attorney General has not interposed an objection within sixty days after such submission." Relying upon this language, appellant's assert (Ga. Br. 38-44) that the decision below should be reversed because the plan for reapportionment of the Georgia House of Representatives which was enacted on October 14, 1971, and which was first presented to the Attorney General on November 5, 1971, was not objected to by him until March 3, 1972, more than sixty days after the date of submission. We show below that these facts do not warrant reversal. First, the issue of timely objection is not appropriately before this Court. The district court enjoined the use of the March 9, 1972, plan. Georgia concedes that that plan was objected to within nine days of its submission to the Attorney General. Since no other plan was properly before the district court, on conceded facts, Georgia's argu-

ment is meritless. Second, the October 1971 plan, as to which appellants claim no proper objection was made, was not fully submitted to the Attorney General until January 6, 1972. Objection was made on March 3, 1971, less than 60 days later. To be sure the plan was first presented to the Attorney General on November 5, 1971. But that presentation failed to comply with the requirements of a "submission" under the Attorney General's regulations. Amici will show that the Attorney General had the power to promulgate regulations defining the prerequisites of a submission, that the regulations he promulgated were necessary to a rational implementation of the Voting Rights Act and consistent with its provisions, and that the Attorney General's action in accordance with the regulations is entitled to approval by this Court.

B. The Reapportionment Plan Before This Court Is the March 1972 Plan to Which the Attorney General Interposed Objection Nine Days After Its Submission.

The reapportionment plan before this Court, and enjoined by the lower court, was timely objected to by the Attorney General nine days after its promulgation. On March 9, 1972, six days after the Attorney General had objected to Georgia's first plan, the Georgia General Assembly enacted a new plan for reapportionment of the Georgia House. This plan was submitted to the Attorney General on March 15, 1972, and he objected to it on March 24, 1972 (A. 6, 18). It is this March plan which the State of Georgia then attempted to put into effect, and it is the implementation of this plan which the district court enjoined (A. 75).* Thus, the Attorney General objected within the 60-day period to the only reapportion-

* This Court subsequently stayed the enforcement of the district court's order. *Georgia* v. *United States*, No. A-1106 (April 21, 1972). The 1972 election for the Georgia House of Representatives was held pursuant to the March plan.

ment plan before the Court. Appellants' argument that his objection was untimely should thus be rejected.

Appellants seek to avoid this clear-cut result by contending that the two reapportionment plans are in essence one and that it is actually the October 1971 plan which is at issue in this case. There is no basis for this contention. The October plan contained 105 districts while the March plan contained 128 (see pp. 4, 7, *supra*). Forty-nine of the "October" districts were multi-member districts, as compared to 32 of the "March" districts (see pp. 4, 7, *supra*). Fourteen of the "October" districts were altered in the March plan to provide for new districts or new boundary lines (see p. 7, *supra*). Moreover, in enacting the March 1972 plan, the Georgia General Assembly repealed the plan enacted in October. Having statutorily interred the October plan, appellants cannot resurrect it by mere assertion. Only the March plan is here at issue. The Attorney General's objection to that plan was well within the 60-day requirement.

C. The Timing of the Objection to the October Plan Was Consistent with the Attorney General's Regulations and with a Reasonable Construction of Section 5.

1. *Introduction.*

Following enactment of the Voting Rights Amendments of 1970, the Attorney General adopted procedures governing the submission to him of changes in state laws which affect voting.[41] 28 C.F.R. Part 51. These provide, *inter alia*:

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[41] The promulgation of the regulations followed nearly nine months of study and comment. The first draft of the regulations was circulated among interested persons on January 27, 1971, and many comments were received. The regulations were then published and comments invited. 36 F.R. 9781 (May 28, 1971).

"§ 51.8 Computation of time.

"(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

"(b) The 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements of § 51.10(a). . . ."

"§ 51.10 Contents of submissions.

"(a) Each submission shall include:

. . . .

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. . . . When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

§ 51.18 Obtaining information regarding submissions.

"(a) If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. . . ."

The Attorney General proceeded strictly in accordance with these regulations in requesting additional information to enable him to evaluate the purpose and effect of the October 1971 plan. Thus, appellants' contention that the Attorney General's objection was untimely constitutes an attack upon the validity of the regulations themselves.

2. *The Attorney General Possessed Authority To Promulgate Procedural Rules Necessary To Implement the Voting Rights Act.*

In enacting the procedural regulations at issue here, the Attorney General relied explicitly upon Section 5 of the Voting Rights Act and 5 U.S.C. § 301 (see 28 C.F.R. at 136). These statutes provide authority for his action.

Section 301 of Title 5 authorizes the heads of Executive departments, including the Attorney General,[*] to:

> "provide regulations for the government of his department, the conduct of its employees, [and] the distribution and *performance of its business* . . . ." (Emphasis added.)

The enforcement of Section 5 is without question the business of Justice Department and thus it is reasonable to read Section 301 to authorize the Attorney General to adopt procedural regulations for its administration.

The cases confirm this reading. *United States* v. *Morehead*, 243 U.S. 607 (1917), and *Smith* v. *United States*, 170 U.S. 372 (1892), hold that Section 301 authorizes an "Executive department" to enact regulations implementing a statute which it has been given the responsibility to enforce. *FCC* v. *Schreiber*, 381 U.S. 279 (1965), holds that this power is to be broadly construed. Thus the Attorney General's procedural regulations regarding submissions allow him to conduct properly the "performance of [his] business" and are authorized by 5 U.S.C. § 301.

Further, Section 5 itself implicitly authorizes the Attorney General to promulgate implementing regulations. This Court has recognized that in enacting a regulatory statute and authorizing an agency to enfore it, Congress may have intended, even in the absence of express author-

[*] In 5 U.S.C. § 101 the Department of Justice is listed as one of the "Executive departments" to which 5 U.S.C. § 301 applies.

ization, to delegate to the agency the power to enact regulations necessary to the proper implementation of the law. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 218-19 (1943); see also K. Davis, 1 *Administrative Law* § 5.03, at 299, n. 2 (1958); cf. *FCC* v. *Schreiber*, *supra*, 381 U.S. at 289. The duty of the Attorney General to approve or reject changes in state law has demanded that he gain an understanding of the information needed to make such a submission satisfactory. Only he, and not the court, is faced with this problem.[a] Accordingly, it is reasonable to conclude that Congress intended that the "administrative procedures [should] be designed by [the Attorney General who is] most familiar with the regulatory problems involved." *FCC* v. *Schreiber*, *supra*, 381 U.S. at 290.[a]

In sum, then, the Attorney General was authorized by 5 U.S.C. § 301 and Section 5 of the Voting Rights Act to adopt regulations necessary to enable him to carry out his duties under the latter section. We show below that the regulations at issue fall within this authority.

3. *The Attorney General's Regulations Are Necessary to Effective Implementation of Section 5.*

Section 51.3 of the Attorney General's regulations states that the 60-day period for objection shall commence running only when the Attorney General has facts necessary to a proper evaluation of the change in the state voting

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[a] To obtain clearance from the District Court for the District of Columbia, a State must file a complaint. It is only the Attorney General who receives a "submission."

[a] Compare *Allen*, *supra*, 393 U.S. at 571, where the Court looked in vain for regulations of the Attorney General which would govern "submission," with *State Board of Election Commissioners* v. *Evers*, 405 U.S. 1001, 1004 (1972) (Blackmun, J., joined by Rehnquist, J., concurring), where two Justices pointed out that the newly promulgated regulations of the Attorney General would in the future alleviate the problem presented by that case.

laws. Thus, complete presentations are "submissions" which will start the 60-day period; incomplete presentations are not "submissions" and do not commence the running of the 60 days. To perform effectively, the Attorney General must issue such regulations. Any other rule would leave him without the facts needed to perform responsibly the job which Congress called upon him to perform, that is, the review of changes in the voting laws of covered States to make certain that they are not racially discriminatory in either purpose or effect.

Under Section 5, any State or political subdivision within the coverage of the Act may call upon the Attorney General to determine whether a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" is free of race discrimination in both purpose and effect. The range and variation of the provisions that may be presented to him are vast. See *infra*, n. 48. Some will be quite difficult to evaluate. Given the breadth of the responsibility assigned to him by the Congress, it is imperative that the Attorney General require that the information necessary for the proper evaluation of a change be submitted before he is called upon to make a judgment as to its potential for racial discrimination."

Common sense suggests that Congress must have so intended. Further support for that conclusion is provided by *American Farm Lines* v. *Black Ball Freight Services*, 397 U.S. 532 (1970), which involved the validity of a grant of temporary operating authority made by the Interstate Commerce Commission. The primary issue in the case was whether the carrier involved had in fact ade-

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"The Attorney General and his representatives are, of course, the individuals best qualified to determine what information should be presented in connection with a submission. See *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390-91; see also *FCC* v. *Schreiber*, *supra*, 381 U.S. at 290.

quately complied with Commission regulations specifying the information it was required to submit in connection with its application for such authority. The Court split on this issue. However, both the majority and the dissent agreed that regulations requiring the submission of information were essential if the Commission was to carry out its statutory duty of ruling on requests for temporary authority. *Id.* at 538, 548.[*] In view of the complexity of the decisions the Attorney General is required to make under Section 5 and the fundamental importance of the substantive rights involved, the Attorney General's need for information is at least as great as that which the Court found sufficient to justify the similar regulation by the ICC in *American Farm Lines*.

We submit, then, that the Attorney General's regulation defining the nature of a submission under Section 5 in terms of the data to be included is necessary to the proper administration of the Act and within his statutory authority. Similarly, his regulation providing that the 60-day period for objection does not commence until such data are received must also be authorized for the former regulation would be meaningless without the latter.

This Court in *Allen* and the district court below indicated one of the bizarre results which would follow were these regulations not sustained. In the Mississippi cases decided with *Allen*, appellees argued that even if the changes involved there were covered by Section 5, they

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[*] The dissent was particularly emphatic on this point. It stated that the regulations implemented "not only the statutory standard [regarding grants of temporary operating authority], but also the fundamental scheme of our national transportation policy," and that they were "designed to elicit information critical to determining whether in light of congressional policies a particular factual situation warrants the grant of a temporary authority." *American Farm Lines* v. *Black Ball Freight Service*, *supra*, 397 U.S. at 543, 596.

could nonetheless be put into effect because the Attorney General had become aware of them, thus they had been "submitted," and the Attorney General had not objected within 60 days of this "submission." Not surprisingly, this Court rejected the argument, stating:

> "While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a 'submission' occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner." *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 571.

Appellants' challenge to the regulations is not substantially different from that rejected in *Allen*. Carried to its logical conclusion, it would allow a covered State to present the Attorney General with the statutory words of a change in a voting law or procedure bereft of the information necessary to a proper evaluation of that change. It would require the Attorney General to pass on the plan within 60 days although he did not have the requisite information and had been unable to obtain it. The court below recognized that this would be a consequence of appellants' argument. Moreover, the court recognized that it was not merely a theoretical possibility, but that it had occurred in this very case.[47] (See A. 74). Because such a ruling would have required the Attorney General to have acted irrationally, the court rejected the argument that Congress could have intended such a result.

Acceptance of appellants' argument would leave the Attorney General little choice but to object to any change

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[47] In this case the State of Georgia did not submit the additional information necessary to allow the Attorney General properly to evaluate the October 1971 reapportionment plan until 62 days after it submitted the plan (A. 9). This was 48 days after the Attorney General had notified the State that this additional information would be required (A. 89).

affecting voting which was at all complex if the State had not presented the information necessary to determine whether the change had a potential for discrimination. Indeed, given the fact that the Attorney General could not independently investigate all such changes because of the limited resources at his command,[46] he would appear duty bound to object wherever he could not find that the change was free of a potential for racial discrimination. But there is no reason for this Court to read the provision simply to compel the Attorney General to render some decision within 60 days of the time a covered State submits a change to him in some way. Rather, the Court should accept the construction placed upon the statute by the Attorney General which will allow him to make a reasoned decision by recognizing that he possesses the authority to specify that the 60-day period will commence only when the information essential for such a decision has been presented to him. Such an interpretation is not only necessary to the effective implementation of Section 5, it is also helpful to covered States, for it allows them to supplement their initial submissions when they are defective and thereby gives them a better chance of obtaining clearance for changes in their voting procedures and laws without the necessity of litigation.

Finally, whether or not the regulations are controlling upon the courts by reason of the authority vested in the Attorney General, they are entitled to great weight by the Court in construing the 60-day provision of Section 5. An administrator charged with enforcement of a statute is free to issue interpretive regulations and since he is the one most familiar with the statute and the problems which arise under it, these regulations are entitled

[46] Since 1969, the Attorney General has reviewed 881 reapportionments (U.S. Br. 26 n. 19).

to considerable deference. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)."

Indeed, this Court has already ruled that the Attorney General's construction of the very statute at issue here is entitled to such deference. Thus, in *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390-91, where another matter of interpretation of Section 5 was at bar, the Court said:

> "Our conclusion . . . draws further support from the interpretation followed by the Attorney General in his administration of the statute. '[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)."

In sum, the Attorney General's regulations providing that a change is submitted only when the information necessary to evaluate it is received should be given au-

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"The statute involved in *Skidmore* was the Fair Labor Standards Act of 1938, 52 Stat. 1060 (1938). Final responsibility for interpreting and even for applying the Act in the first instance lay with the courts, not the Wage-Hour Administrator. *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 138. Indeed, "[a]fter considering a bill granting a general rule-making power to the Administrator, Congress [had] adopted a measure withholding such power." 1 K. Davis, *supra*, § 5.03, at 300-01. This Court nonetheless held that interpretive bulletins issued by the Wage-Hour Administration were to be given considerable weight by the courts in construing the statute, stating: "This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin. We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 140. See also *Perkins* v. *Matthews*, *supra*, 400 U.S. at 390-91.

thoritative effect by the Court, and in any event, his c
struction of the statute, based upon more than six ye
experience in its administration, is reasonable and n
sary to an effectuation of the purpose of Section 5.
such, it should be adopted by this Court and appella
argument that the Attorney General's objection to
October plan was untimely should be rejected.

CONCLUSION

Wherefore, amici urge this Court to affirm the decisi
of the district court and to remand with directions th
a new reapportionment plan be adopted and reviewe
pursuant to Section 5 and that new elections be held
mediately upon approval of the revised plan by the A
torney General or the District Court for the District o
Columbia.[**]

Respectfully submitted,

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[**] Amici note that the district court can fashion an adequate remedy without prescribing the particular changes necessary in the present redistricting scheme. Appellants may be placed under an injunctive decree to fashion a plan satisfactory to the Attorney General or the District Court for the District of Columbia. This remedy would comport with the statutory scheme of Section 5 which contemplates that revisions in voting laws be submitted either to the Attorney General or to the District Court for the District of Columbia. The relief granted would be similar to that suggested by this Court in *Perkins* v. *Matthews*, 400 U.S. 379, 396-97 (1971), that "it might be appropriate to enter an order affording local officials an opportunity to seek federal approval. . . ."